A. S. B. Cloture, Ltd. and Local Union No. 46, Sheet Metal Workers International Association. Case 3-CA-18217

March 31, 1994

DECISION AND ORDER

By Members Stephens, Devaney, and Browning

Upon a charge filed by Local Union No. 46, Sheet Metal Workers International Association (the Union) on November 10, 1993, the Acting General Counsel of the National Labor Relations Board issued a complaint on December 21, 1993, against A. S. B. Cloture, Ltd. (the Respondent) alleging that it has violated Section 8(a)(1) and (5) of the National Labor Relations Act. Although properly served copies of the charge and complaint, the Respondent failed to file an answer.

On February 14, 1994 the Acting General Counsel filed a Motion for Summary Judgment with the Board. On February 16, 1994, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Region, by letter dated January 13, 1994, notified the Respondent that unless an answer were received January 21, 1994, a Motion for Summary Judgment would be filed. To date, no answer has been filed.

In the absence of good cause being shown for the failure to file a timely answer, we grant the Acting General Counsel's Motion for Summary Judgment.¹

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times the Respondent, a corporation with an office and place of business in Rochester, New York, has been engaged in the construction industry as a sheet metal contractor specializing in heating and air conditioning work. At all material times, Sheet Metal Contractors of SMACNA-Rochester, Inc. (the Association) has been an organization composed of various employees engaged in the construction industry, one purpose of which is to represent its employer-members in negotiating and administering collective-bargaining agreements with the Union. At all material times, the Respondent has been an employer-member of the Association and has delegated the Association to represent it in negotiating and administering collective-bargaining agreements with the Union.

Annually, the Respondent and the employer-members of the aforementioned Association, in the course of their business operations, collectively provided services valued in excess of \$50,000 for enterprises within the State of New York which are directly engaged in interstate commerce. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The employees of the Respondent, as more fully described in article I, section 1, of the collective-bargaining agreement between the Union and Sheet Metal Contractors of SMACNA-Rochester effective by its terms from May 1, 1993, to April 30, 1996, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

Since about 1985 and at all material times, the Union has been the designated limited exclusive collective-bargaining representative of the unit, and since then the Union has been recognized as the representative by the Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective from May 1, 1993, to April 30, 1996.

At all times since 1985, based on Section 9(a) of the Act, the Union has been the limited exclusive collective-bargaining representative of the unit.²

¹Although copies of the complaint, sent by certified mail to the Respondent, were returned marked ''unclaimed'' and ''returned to sender'' by the Post Office, the Respondent's failure or refusal to claim certified mail or to provide for receiving appropriate service cannot serve to defeat the purposes of the Act. See *Michigan Expediting Service*, 282 NLRB 210 fn. 6 (1986); and *Mondie Forge Co.*, 309 NLRB No. 82 (not reported in Board volumes).

²The complaint's commerce data and unit description suggest that the Respondent is a construction industry employer subject to the provisions of Sec. 8(f) of the Act. Accordingly, in the absence of an allegation that the bargaining relationship was actually based on 9(a) majority support, we find that the relationship was entered into pursuant to Sec. 8(f), and that the Union is therefore the limited 9(a) representative of the unit employees for the period covered by the contract. See *Electri-Tech, Inc.*, 306 NLRB 707 fn. 2 (1992) (citing

About June 1993, the Respondent failed to continue in effect all the terms and conditions of the agreement described above by: (1) failing to make payments on behalf of its unit employees to the Union's Pension, Health, and Annuity Fund and the Sheet Metal Workers International Association National Pension Fund A; and (2) failing to pay liquidated damages and interest on delinquent contributions to the Union's Pension, Health, and Annuity Fund and the Sheet Metal Workers International Association National Pension Fund A.

Although the terms and conditions of employment described above are mandatory subjects for the purpose of collective bargaining, the Respondent engaged in the conduct without the Union's consent.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has been failing and refusing to bargain collectively and in good faith with the limited exclusive collective-bargaining representative of its employees, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 8(d) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) by failing about June 1993 to make contributions to the Union's Pension, Health, and Annuity Fund and the Sheet Metal Workers International Association National Pension Fund A, and by failing to pay liquidated damages and interest on delinquent contributions to the funds, as required by the 1993-1996 agreement, we shall order the Respondent to honor the terms of the agreement and to make whole its unit employees for its failure to do so by paying all such delinquent contributions, liquidated damages, and interest, including any additional due the funds in accordance with Merryweather Optical Co., 240 NLRB 1213, 1216 fn. 7 (1979). In addition, the Respondent shall reimburse unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in Kraft Plumbing & Heating, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, A. S. B. Cloture, Ltd., Rochester, New York, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Failing to bargain collectively and in good faith with Local Union No. 46, Sheet Metal Workers International Association as the limited exclusive bargaining representative of the employees described in article I, section I of the 1993–1996 collective-bargaining agreement, by failing to make payments to the Union's Pension, Health, and Annuity Fund and the Sheet Metal Workers International Association National Pension Fund A and by failing to pay liquidated damages and interest on delinquent contributions to the funds, as required by the agreement.
- (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Honor the terms of the 1993–1996 collective-bargaining agreement, and make whole the unit employees for its failure to do so, as set forth in the remedy section of this decision.
- (b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.
- (c) Post at its facility in Rochester, New York, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.
- (d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

John Deklewa & Sons, 282 NLRB 1375 (1987), enfd. sub nom. Iron Workers Local 3 v. NLRB, 843 F.2d 770 (3d Cir. 1988).

Member Browning finds it unnecessary to decide in this proceeding whether the parties' relationship is governed by Sec. 9 or by Sec. 8(f). She notes that in either event the Respondent was obligated to adhere to the terms and conditions of the 1993–1996 collective-bargaining agreement.

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail to bargain collectively and in good faith with Local Union No. 46, Sheet Metal Workers International Association as the limited exclusive bargaining representative of the employees described in article I, section 1 of our 1993–1996 collec-

tive-bargaining agreement with the Union, by failing to make payments to the Union's Pension, Health, and Annuity Fund and the Sheet Metal Workers International Association National Pension Fund A, and by failing to pay liquidated damages and interest on delinquent contributions to those funds, as required by the agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL honor the terms of the 1993–1996 collective-bargaining agreement, and WE WILL make whole the unit employees for our failure to do so.

A. S. B. CLOTURE, LTD.